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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE CAYMAN ISLANDS AS AMICI CURIAE

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INTRODUCTION

The United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") and the Cayman Islands ("Cayman") submit this brief as amici curiae in relation to the petition of the Bank of Nova Scotia (the "Bank") for a writ of certiorari.[1]

[1] Both petitioner and respondent have consented to the appearance of the United Kingdom and Cayman as amici curiae, and written consents are on file with the Clerk. The United Kingdom and Cayman previously appeared as amici in this matter before the United States Court of Appeals for the Eleventh Circuit and on remand before the United States District Court for the Southern District of Florida. The decision below is reported at 740 F.2d 817.

FACTS

The statement of the case and the facts relating to the documents located in Cayman (the "Cayman Brady documents") are generally set forth in the Bank's petition. Amici draw particular attention to the following.

Cayman criminal law prohibits a witness' production of confidential Cayman bank records to foreign tribunals, absent the Cayman Grand Court's permission or the consent of the witness' customer.[2] The Grand Court has regularly granted such permission in United States criminal cases as a matter of comity as the interests of justice so require.[3] However, "while th[e Grand] Court is anxious to assist foreign [United States] tribunals in the due administration of justice it can only do so in accordance with local [Cayman] law,"[4] which law, as con-

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[2] The [Cayman Islands] Confidential Relationships (Preservation) Law, 1976 (Law 16 of 1976); The [Cayman Islands] Confidential Relationships (Preservation) (Amendment) Law, 1979 (Law 26 of 1979) (collectively referred to in text, *infra*, as the "CR(P)L").

Compare United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *petition for cert. filed*, 53 U.S.L.W. 3160 (U.S. Aug. 7, 1984) (No. 84-270) (criminal contempt) (compelling criminal defendant, a customer of the Bank, to execute "consent directive," waiving his rights under Cayman CR(P)L, does not violate defendant's Fifth Amendment rights) *with id.* at 819 (Clark, J., dissenting) (contra) *with In the Matter of Consent Directives Executed Pursuant to Orders of Foreign Courts*, Cause No. 269 of 1984, Civ. Jur. (Grand Ct., Cayman Islands, July 24, 1984) (the *"ABC Ltd. Case"*) (Summerfield, C.J.) ("On the face of it, the consent given in Ghidoni's case is consent given under compulsion and does not amount to consent for the purposes of our law.").

[3] *See, e.g., In the Matter of Proceedings Pending in the United States District Court for the Central District of California between United States of America and John Z. DeLorean, et al.*, Cause No. 118 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Apr. 19, 1983); cases *cited in* note 11 *infra*.

[4] *In the Matter of a Subpoena Duces Tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia*, Cause No. 187 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, in Chambers, Nov. 11, 1983); *accord In the matter of a Subpoena Duces Tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia*, Cause No. 187 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, in Chambers, May 31, 1983).

strued, requires a showing of materiality and relevance satisfactory to the Grand Court.[5]

Owing to Cayman bank secrecy legislation,[6] as construed by the Queen's judges in Cayman, the United States occasionally had difficulty prior to October 1982 in obtaining documentary information located in Cayman to support criminal prosecutions in the United States. To overcome these difficulties Cayman (with the consent of the United Kingdom) and the United States entered into an Agreement on October 5, 1982 (the "Cayman/U.S. Agreement").[7] The Cayman/U.S. Agreement provided procedures whereby the United States could obtain documents from Cayman in criminal investigations when criminality was common to both countries, including international narcotics trafficking offenses and international financial operations connected with drug abuse offenses. Cayman, by way of the United Kingdom, and the United States are also parties to the Single Convention on Narcotic Drugs, 1961, and to the amending Protocol of March 25, 1972 (collectively, the "Single Convention"),[8] which treaty established these trafficking and ancillary offenses as common to, *inter alia,* the United States and Cayman.[9]

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[5] *See, e.g.,* Practice Note to all Attorneys-At-Law, Grand Ct., Cayman Islands (Apr. 29, 1982) ("Section 3A of the [Cayman] Confidential Relationships (Preservation) Law").

[6] *See* Cayman CR(P)L *cited in* note 2 *supra.*

[7] Letter of D.H. Foster, Acting Governor of the Cayman Islands, to Michael Carpenter, Consul-General, United States Embassy, Kingston, Jamaica (Oct. 5, 1982) (the "Cayman/U.S. Agreement"). Cayman deemed itself bound by the agreement (*e.g.*, "Governor Lloyd clearly indicated the decision of the Cayman Islands to implement the working procedures . . . ." 740 F.2d at 829). *See* note 14 *infra.*

[8] Single Convention on Narcotic Drugs, 1961, *Done at New York* March 30, 1961, *entered into force with respect to the United States,* June 24, 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151; Amendment to Single Convention on Narcotic Drugs, 1961, *Protocol done* Mar. 25, 1972, *entered into force with respect to the United States,* Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 4.

[9] Single Convention, art. 36(2)(a)(ii), *in pari materia with id.*, art. 36(1), *explained in, e.g., Commentary on the Single Convention on Narcotic Drugs,* 1961 at 427-29, 432-34, U.N. Sales No. E.73.XI.1 (1973).

The Cayman documents requested in the subpoena related to two United States citizens (the "targets" or "Brady") and their corporations and were sought by the grand jury in connection with, and in anticipation of, a United States narcotics and tax evasion prosecution.[10]

In its search for documentary information in Cayman relating to the targets of the grand jury's investigation, the United States never used the provisions of either the Cayman/U.S. Agreement or the Single Convention or otherwise sought cooperation from the governments of Cayman or the United Kingdom. Yet at no time had the United States abrogated either this Agreement or this treaty, or otherwise advised amici that the United States would no longer adhere to the provisions thereof, whether on the ostensible grounds they were not as effective or efficient as unilateral extraterritorial grand jury subpoenas, or on any other grounds. Indeed, but for the Bank, Cayman might never have learned of the United States' attempt to force the Bank and its Caymanian employees to remove the Cayman Brady documents from Cayman soil in violation of Cayman law.

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[10] The United States eventually informed the Bank that the grand jury's "investigation involves apparent violations of both the tax and narcotics laws of the United States." Six months later, during the pendency of the Bank's subsequent appeal, it was disclosed that the United States expected that the subpoenaed records would disclose extensive unlawful money laundering by the targets and their corporations through the Bank's Bahamian and Caymanian branches in connection with the targets' drug trafficking operations between the Bahamas and the United States. The documents sought in the subpoena were further believed by the United States to be material to the narcotics importation offenses in that the Bank's records would provide evidence of the targets' personal involvement in moving the resultant drug profits among Cayman, the Bahamas, and the United States. According to the United States, the Bank maintained accounts of those targets, which accounts were utilized in international narcotics smuggling. These latter disclosures first appeared in an affidavit made by the United States, four days *after* the United States had formally advised the Governor of Cayman that "this case concerns the Bahamas and not the Cayman Islands" (which erroneous advice was never corrected by any further communication to Cayman). *See* Letter of Michael Carpenter, Consul General, United States Embassy, Kingston, Jamaica, to G. P. Lloyd, Governor of the Cayman Islands (Oct. 31, 1983).

When the Bank sought to discharge its statutory responsibilities under Cayman law by applying to the Cayman Grand Court for permission to release confidential account documents relating to Brady, the United States did not assist either the Bank or the Grand Court, despite notice of the Grand Court's procedures and contrary to longstanding United States practice.[11] On May 31, and November 11, 1983 the Cayman Grand Court expressly enjoined the Bank from releasing the Cayman Brady documents, stating that the Grand Court required evidence of criminality in order to issue the necessary order to allow the Bank to release documents.[12] The United States authorities took no steps to provide that evidence to the Bank or to the Cayman Grand Court.

On November 17, 1983, while this case was on appeal, the Governor of Cayman issued an unprecedented order pursuant to Cayman's bank secrecy statute, which the Grand Court held permitted the Bank to disclose the Cayman Brady documents to the United States. Accordingly, upon receipt of the Governor's

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[11] *See, e.g., In the Matter of a Subpoena issued out of the United States District Court for the* [*Venue Deleted*] [*Anonymous*] [*Parties Deleted*] [*U.S. Dist. Ct. Case No. Deleted*], Cause No. [Deleted] of 1984, Civ. Jur. (Grand Ct., Cayman Islands, Feb. 20, 1984) (citation redacted per Grand Court) (authorizing release of information for use in United States tax evasion prosecution ancillary to United States international narcotics trafficking prosecution). For earlier illustrative cases regarding customary United States practice, see, *e.g., In the Matter of a Subpoena Duces Tecum Dated 24th March, 1983 issued out of the United States District Court for the Northern District of Georgia at the instance of the United States against* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, June 16, 1983); *In the Matter of a Subpoena Dated 21st April, 1983 issued out of the United States District Court for the Northern District of Georgia at the instance of the United States against* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Aug. 11, 1983); *In the Matter of the Subpoena issued by the United States District Court for the District of Columbia in Civil Case No. 81-342 between the United States v.* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1982, Civ. Jur. (Grand Ct., Cayman Islands, Sept. 29, 1982); *In the Matter of an Application by* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Feb. 9, 1983) (re N.D. Ohio); *In the Matter of an Application by* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Mar. 10, 1983) (re C.D. Cal.); *In the Matter of an Application by* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, May 25, 1983).

[12] *See* cases *cited in* note 4 *supra*.

order, the Bank and its Caymanian employees were no longer in imminent peril of criminal prosecution in Cayman if they produced the Cayman Brady documents to the grand jury.[13] They did so within hours. Nevertheless, following remand, the judgment of civil contempt against the Bank was affirmed.

The United States' disregard of the Cayman/U.S. Agreement, the Single Convention, and Cayman Grand Court's judgments created confusion and delay in the United States obtaining the information it desired, which was bound to operate in favor of other narcotics traffickers.[14]

The United Kingdom and Cayman therefore proposed to the United States a new procedure for United States authorities to follow to obtain documents concerning narcotics trafficking located in Cayman, which procedure was a logical extension of those contained in the Cayman/U.S. Agreement. In return the United States agreed not to enforce federal subpoenas issued in respect of documentary information in such cases. An agreement incorporating these features, informally known as the Cayman Narcotics Agreement 1984, came into force on August 29, 1984.[15]

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[13] *In the Matter of a Subpoena Duces Tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia,* Cause No. 187 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, in Chambers, Nov. 18, 1983).

[14] Even if the Cayman/U.S. Agreement did not bind the United States to utilize its procedures, Cayman deemed itself bound by them. *See* note 7 *supra.* The diplomatic channels provided by the Cayman/U.S. Agreement were thus always available to the United States. Cayman would undoubtedly have acted under the Cayman/U.S. Agreement to provide for release of the information sought in this case. Had Cayman not done so, the United Kingdom would certainly have insured such release by instructions to the Governor of Cayman. The information would have been in the hands of the Department of Justice in a matter of days from the date of the Department's first request to Cayman. In fact the United States has repeatedly secretly utilized the agreed procedures under the Cayman/U.S. Agreement in similar "narco-tax" cases, as well as numerous other kinds of criminal cases, to obtain the release of confidential government and private sector information and documents located in Cayman. *See, e.g.,* note 11 *supra* & note 20 *infra.*

[15] Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning the Cayman Islands and Matters Connected

THE INTERESTS OF THE UNITED KINGDOM AND THE CAYMAN ISLANDS

Cayman is a dependent territory of the United Kingdom for whose external relations and vital interests the United Kingdom is responsible.[16] The United Kingdom is concerned that the banking and off-shore finance business of Cayman be conducted with full regard to Cayman's duty to the international community and, in particular, to the United States, to prevent the use of off-shore banking facilities by criminals engaged in money-laundering operations and to take all practicable measures for the prevention of abuse of drugs. To that end, Cayman legislation is examined closely and critically and is subject to the approval of the United Kingdom. The Cayman Confidential Relationships (Preservation) Law, 1976 and the Amendment thereto (collectively, the "CR(P)L")[17] were scrutinized with particular regard for the possible need of exempting from its provisions evidence in criminal prose-

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With, Arising From, Related To, or Resulting From any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961 as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961, *Done at London* July 26, 1984, *entered into force*, Aug. 29, 1984. The Agreement provides:

> 6.1 No federal subpoena (including a Grand Jury subpoena) related to documentary information located in Cayman in any matter falling within paragraph 2.1 of this Agreement will be enforced in the United States without the prior agreement of either the United Kingdom Government or the Cayman Government.

Cayman Narcotics Agreement, 1984, art. 6.1 ("Exclusivity").

Article 2.1 sets the scope of the Agreement as applying "to all offences or ancillary civil or administrative proceedings taken by the United States Government or its agencies connected with, arising from, related to, or resulting from any narcotics activity . . . ." *See generally* The [Cayman Islands] Narcotic Drugs (Evidence) (United States of America) Law, 1984 (Law 17 of 1984), passed by the Cayman Legislative Assembly Aug. 17, 1984, assented to by the Governor Aug. 27, 1984, effective Aug. 29, 1984.

[16] "This [District] Court concludes that the interests of the Caymans may also be characterized as 'vital.' " (Bank's Pet., App. 14b). So are the United Kingdom's interests. *See, e.g.*, The Constitution of the Cayman Islands §§ 1, 38-39, 49, 58, in The Cayman Islands (Constitution) Order 1972 [Schedule 2].

[17] *See* note 2 *supra*.

cutions, including drug offenses.[18] The Single Convention, the Cayman/U.S. Agreement, and the Cayman Narcotics Agreement 1984 all provide for securing to the United States authorities information in Cayman for use in international narcotics trafficking prosecutions in circumstances of strict security.

The United Kingdom and Cayman are seriously disturbed that the United States ignored the diplomatic channels provided by the Single Convention and the Cayman/U.S. Agreement in this case to obtain the Cayman Brady documents. They are equally disturbed by the United States' refusal, based on the unsustainable and inapposite argument of the secrecy of grand jury proceedings, to provide evidence to enable the Cayman Grand Court to authorize the timely release of those documents. Even if the Cayman/U.S. Agreement were not the exclusive method available to the United States, considerations of other international obligations and comity would suggest seeking evidence by way of the Cayman courts rather than by resorting to unacceptable and divisive unilateral methods.

In amici's view, the *proper* main object in *United States v. Brady*, No. 83-8067-CR-Hastings (S.D. Fla. filed Dec. 1, 1983) is interdictive action against pernicious international narcotics trafficking. But this action was in fact here achieved through the cooperative action of the Cayman Governor and will in the future be so achieved by comity by virtue of the conclusion of the Cayman Narcotics Agreement 1984 (and by Cayman's implementation of that Agreement by legislation). By contrast, the acts and omissions of the United States in the *Brady* case and this case remain unacceptable in both law and international comity.

Finally, amici wish this Court to be aware that these amici repeatedly faced a serious and discomforting dilemma in this case by virtue of their peculiar dual status as foreign sovereign and amici curiae. Directed by the United States to utilize amicus briefs, rather than diplomatic notes, to express their

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[18] *In the Matter of Proceedings Pending in the United States District Court for the District of Columbia between United States of America and Roy R. Carver, Joseph C. Lemire, et al.*, (C.A., Jamaica 1982).

views and representations to United States courts,[19] these amici have been required to deny the jurisdiction of the United States courts over them. Denying such jurisdiction, amici could not intervene as parties filing briefs qua parties or developing records before those same courts. Nevertheless, if the United Kingdom and Cayman were to present their views through amicus briefs, amici had to advise those courts what they believed to be the relevant facts and law, though such information, not being available to the subpoenaed party, was *de hors* the record.

Yet when these amici attempted to make these factual representations openly and in good faith in this case, their requests to do so were opposed by the United States at each stage. Moreover, on procedural grounds, amici's extra-record representations as to fact have been given little or no credence.[20] These circumstances have left amici uncertain as to the

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[19] *See, e.g.*, United States Department of State Circular, Diplomatic Note to Chiefs of Mission (Aug. 17, 1978) (Dept. of State File No. P 78-0154-2042), *reprinted in* M. Nash, *Digest of United States Practice in International Law 1978* Ch. 4, § 1, at 560 (Office of the Legal Adviser, Dept. of State) (1978), *reprinted in* M. Nash, *Contemporary Practice of the United States Relating to International Law*, 73 Am. J. Int'l. Law 122, 124 (1979); *accord* Formal Statement of Interest of the United States in *Westinghouse, Inc. v. Rio Algom Ltd.* (May 6, 1980), *reprinted in* 1980 Trade Reg. Rep. (CCH) ¶ 50,416.

[20] *See generally In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 722 F.2d 655 (11th Cir. 1983) (remand order) ("[W]e are concerned that much relevant information was either not available or deliberately withheld or both."), *following remand*, 740 F.2d 817 (1984), *petition for cert. filed*, 53 U.S.L.W. 3369 (U.S. Aug. 31, 1984) (No. 84-329). The United States never produced all relevant information in its possession (most of it uniquely in its possession). Attempts by amici to redress this imbalance by offering to substantiate their representations by producing crucial and newly declassified documents in their possession (by way of affidavits) were repeatedly and successfully opposed by the United States. As a result, amici's materials, although compelling, were never accepted into the proceedings, the imbalance was therefore never redressed, and accordingly amici's representations were ignored. Cayman later filed these materials in the District Court in another similar case. *See Supplemental Record Information of the Cayman Islands as Amicus Curiae* (authenticated declassified affidavits of senior officials of the Cayman Government re the Cayman/U.S. Agreement and Single Convention), filed June 5, 1984 in *In re Grand Jury 83-4 (In the Matter of Ian N. Falconer)* ("*Falconer*"), No. FGJ-83-Roettger (S.D. Fla. filed Apr. 20, 1984); Address by E.J.E. Stowers, Q.P.M., Commissioner of Police, Royal Cayman Islands Police Force, to the Federal Bureau of

relevant procedures and disadvantaged as to the presentation of their arguments and facts in this case.[21]

Investigation at the FBI Academy in Quantico, Virginia (Nov. 17, 1982) (FBI training film re agreed procedures under the Cayman/U.S. Agreement) (FBI videotape and transcript filed by Cayman as amicus curiae in *Falconer*). *See generally* J. Harwood & B. Zagaris, *An Enforcement Round-up*, 59 Taxes International 79 (Sept. 84).

[21] *See also, e.g.*, Note, *Foreign Government Participation in United States Antitrust Litigation*, 15 J. Int'l. L. & Econ. 605 (1981) (warning of chilling effect that paradox described in the text may have on foreign sovereigns' willingness to express their views to the American judiciary). *Compare id. with* Letter of Davis R. Robinson, Legal Adviser, U.S. Dept. of State, to Chief Judge Edward T. Gignoux, [U.S. Ct. of App., 11th Cir.,] Chairman, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (May 23, 1983) (titled, "Amicus Curiae Appearances by Foreign Governments in U.S. Courts") *with* authorities *cited in* note 19 *supra*. No less disturbing to these amici is the increasing predilection of United States courts—invariably at the instance of the United States—to infer from the *absence* of foreign sovereign amici participation (or formal intervention) that the asserted vital foreign interests at stake must not be very vital after all. *See, e.g., United States v. First National City Bank*, 396 F.2d 897, 903-04 (2nd Cir. 1968), *followed in, e.g., United States v. Chase Manhattan Bank and FDC Co. Ltd.*, No. M-18-304 (S.D.N.Y. Mar. 27, 1984) ("By contrast, Hong Kong's interest in this matter is not quite as important [as the United States' interest] because there is no statute barring release of banking records and because the government of Hong Kong has not become a party to the case."), *consolidated appeals filed and oral argument docketed sub. nom. Garpeg Ltd. v. United States*, Nos. 84-6119, 84-6127, 84-6129 (2d Cir. filed Apr. 28, 1984). *But see, e.g., F.D.C. Co. Ltd. v. Chase Manhattan Bank*, Nos. 711, 712, 713 (Supreme Ct., High Ct. of Justice, Hong Kong 1984) (Clough, J.) (judgments entered Apr. 3, 1984 and Apr. 24, 1984) (orders continuing interim injunction), *interlocutory appeal docketed*, (C.A., High Ct. of Justice, Hong Kong filed Apr. 17, 1984); *F.D.C. Co. Ltd. v. Chase Manhattan Bank*, Nos. 711, 712, 713 (Supreme Ct., High Ct. of Justice, Hong Kong 1984) (judgment entered Aug. 7, 1984) (Clough, J.). *See generally X AG v. A Bank*, [1983] 2 All E.R. 464 (Q.B.Div. (Commercial Ct.) U.K.) (Leggatt, J.).

Even more recently the United Kingdom, the British Virgin Islands, and the United States have been discussing a United States subpoena served on Barclays Bank in *Felcyn v. United States*, No. 8456 Misc. (N.D. Cal. filed originally Nov. 29, 1983 in C.D. Cal. and transferred to N.D. Cal. June 28, 1984, consolidating Nos. C82-2674-RG (BX), C83-4140-RG (BX), and C83-4139-RG (BX)), with a view to resolving document production by diplomatic means. Concurrently with these discussions the United States served its applications to enforce the subpoena before the United States District Court

STATEMENT OF LAW

The United Kingdom and Cayman remain of the opinion that in this case the Court's decisions in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958) and *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964) prevail. These amici are also of the view that the neutral principles expressed in the Seventh Circuit's decision in *United States v. First National Bank of Chicago,* 699 F.2d 341 (7th Cir. 1983),[22] and the Third Circuit's *Schofield* decisions[23] should govern in this case.

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for the Northern District of California, representing to that court that the United Kingdom and the British Virgin Islands had no interest in this case as neither had appeared as amicus. That court, having now been informed that the United States' representation was inaccurate, has indicated that the United States should pursue its valid alternatives to subpoena enforcement.

[22] The *First Chicago* holding creates a conflict among United States courts of appeals regarding the propriety of enforcing an order to produce information in violation of foreign law. . . . Until [United States] courts modify their practice of blindly accepting asserted United States interests and engage in good faith evaluations of foreign interests, the situation will not improve. . . . . The United States Supreme Court, which has not ruled on the issues raised by nondisclosure laws since *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* should take a fresh look at the problems caused by subsequent lower court decisions and resolve the existing conflict among the circuits.

Note, United States v. First National Bank of Chicago: *Limiting American Extraterritorial Authority to Order the Production of Documents in Violation of Foreign Law,* 33 De Paul L. Rev. 183, 204-06 (1983).

[23] *See In re Grand Jury Proceedings* (*Schofield I*), 486 F.2d 85 (3d Cir. 1973); *In re Grand Jury Proceedings* (*Schofield II*), 507 F.2d 963 (3d Cir.), *cert. denied,* 421 U.S. 1015 (1975). For a discussion of the conflict among the Circuits and a critique, see, *e.g.*, Note, *International Law—Grand Jury Proceedings—Comity of Nations Fails to Justify a Showing of Relevance Prior to Enforcement of Grand Jury Subpoena,* Grand Jury Proceedings [, United States] v. Bank of Nova Scotia, 7 Suffolk Transnat'l L.J. 565 (Fall 1983). *See generally In re Grand Jury Proceedings, United States v. Bank of Nova Scotia,* 691 F.2d 1384 (11th Cir. 1982), *cert. denied,* ___ U.S. ___, 103 S. Ct. 3086 (1983).

The United Kingdom and Cayman maintain their position regarding the Single Convention. The view of these amici embraces the express terms of that treaty, which in the circumstances of this case gives any signatory the right to *require* that legal papers be sent to it through the diplomatic channel (and imposes on the United States the absolute obligation to comply where and when a signatory so requires). *See* Single Convention, Articles 35(e) & 36.[24] "[T]he Single Convention and Amending Protocol *require* the member countries to the convention to be bound to observe the constitutional, legal and administrative systems of member nations." *In re Nigro,* 555 F. Supp. 65, 70 (D. Colo. 1982), *aff'd* 705 F.2d 1224 (10th Cir. 1982), *cert. denied,* ____ U.S. ____ 103 S. Ct. 2087 (1983) (emphasis added).[25]

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[24] *Commentary on the Single Convention on Narcotic Drugs, 1961* art. 35(e) at 422-24, U.N. Sales No. E.73.XI.1 (1973).

[25] The United States has heretofore acknowledged the applicability of the Single Convention to a matter such as this. Substituting the word "Cayman" for "Turks and Caicos," the United States has said: "[T]he provisions of the Single Convention would dictate the common recognition of judicial determinations by courts of competent jurisdiction as between the [Cayman] Islands and the United States of America. . . . To conclude otherwise would only serve to invalidate the judicial proceedings of the [Cayman] Islands and thereafter [therefore] violate the true spirit of the Single Convention." Letter of Bob A. Ricks, Chief Counsel, United States Drug Enforcement Administration, to Norman Noordewier, S/A State Department Liaison, Foreign Programs Staff, United States Department of State (Feb. 28, 1983) (the "U.S. [Turks and Caicos] Memorandum"), *transmitted under cover of* Letter of William C. Sergeant, Program Officer, Bureau for International Narcotics Matters, United States Department of State, to Roger French, British Embassy, Washington (Apr. 3, 1983). *See also* Cayman Narcotics Agreement, 1984, note 15 *supra.*

The act of state doctrine embodied in the Single Convention, as heretofore construed uniformly by the United States and the United Kingdom, applies with equal force to judgments of the Grand Court of Cayman, which Islands are (like the Turks and Caicos) a dependent territory of the United Kingdom.

> On February 18, 1983, the [United States] government had requested that the [United States District C]ourt [for the Southern District of Florida] take judicial notice of the foreign government status of the [Turks and Caicos] Islands, its relationship with the United Kingdom, and application of the 1961 Single Convention and the 1972 Protocol. A statement of the Attorney General of the Islands was attached to the request. The record does not disclose whether the request was granted.

Even assuming *arguendo* the existence of the Single Convention does not require any *greater* deference to foreign law than that already recognized in the balancing test set forth in Section 40 of the *Restatement (Second) of the Foreign Relations Law of the United States,*[26] due deference must be given to the Cayman CR(P)L and other Cayman law, the two Cayman Grand Court decisions, and the views and representations of the affected foreign sovereigns, in accordance with the decisions of this Court and other United States courts.[27]

The United Kingdom's extension of the Single Convention to Cayman was a *prima facie* act of state. Pursuant to the Single Convention, the United Kingdom maintains the requirement that signatories to that treaty use diplomatic channels to request information located in the United Kingdom or its dependent territories for purposes of a narcotics prosecution. The United Kingdom's requirement is also a *prima facie* act of

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Milburn v. United States, 734 F.2d 762, 764 (11th Cir. 1984) (vacating summary judgment for defendant United States solely for lack of notice and remanding) (tort and inverse condemnation action against United States for returning, pursuant to Single Convention, forfeited airplane to Turks and Caicos seized by those Islands in narcotics smuggling case) (brackets added). *See* note 31 *infra.*

[26] See Section 420 of the *Restatement (Revised) of the Foreign Relations Law of the United States* (Tent. Draft No. 3, 1982), which reflects and represents current scholarly thinking.

[27] In determining the existence and meaning of treaties, "the Supreme Court has stressed the importance of deferring in such cases to the intentions of the State Departments of the *two* nations." *Arnbjornsdottir-Mendler v. United States,* 721 F.2d 679, 681 (9th Cir. 1983) (citing *Terlinder v. Ames,* 184 U.S. 270 (1902)) (emphasis added). To the same effect, see, *e.g., Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184 n.10 (1982) ("position of the Government of Japan is entitled to great weight"). "This question ["whether the Evidence Convention supersedes state and federal discovery procedures"] is one of federal law to be determined by the intent of the parties to the treaty, and the starting point for analysis is the language of the treaty itself. *See Sumitomo. . . .*" Brief for the United States as Amicus Curiae at 6 (Sept. 84), *Club Mediterranee, S.A. v. Dorin, appeal docketed,* 52 U.S.L.W. 3210 (U.S. Sept. 16, 1983) (No. 83-461) (brackets added and case citations omitted). "It is well settled that United States courts should refrain, if possible, from ordering a person to perform an act that would violate the laws or clearly articulated policies of a foreign government." *Id.* at 10. "The courts below, however, do not appear to have engaged in the balancing of pertinent interests necessary to a proper comity analysis." *Id.* at 14.

state. The Cayman Governor's adoption and implementation of the procedures under the Cayman/U.S. Agreement was also a *prima facie* act of state. The Cayman Legislature's enactment of the CR(P)L was also a *prima facie* act of state. So were the Grand Court's decisions under the CR(P)L enjoining the Bank from disclosing the Cayman Brady documents (*i.e.*, those kept at the Cayman branch of the Bank) without the further order of that Court.

The controlling decisions of *this* Court preclude the United States courts from inquiring into the validity of the public acts of state of a recognized foreign sovereign power committed within its own territory in the exercise of its governmental authority.[28] A United States court's refusal to acknowledge either the validity or the applicability of the United Kingdom's and Cayman's respective domestic law requirements is a *de jure* inquiry into, and ruling on, the validity of these amici's acts of state. A United States court's refusal to acknowledge the validity of the Cayman Grand Court's longstanding requirement that a showing of materiality be made under the CR(P)L is a *de facto* ruling on the validity of Cayman's acts of state.[29]

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[28] In describing the act of state doctrine in the past we have said that it "precludes the courts of this country from inquiring into the validity of the *public* acts of a recognized foreign sovereign power committed within its own territory," and that it applies to "acts done within their own states, in the exercise of *governmental authority.*"

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 706 (1976) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964), and *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)) (emphasis in original).

[29] "The application of the act of state doctrine [in the United States courts] to foreign countries' blocking or secrecy laws has been raised only infrequently and so far has met with little success." P. Bschoor & M. Mullin, *Foreign Sovereign Immunity and Act of State*, in *2 Transnational Litigation: Practical Approaches to Conflicts and Accommodations* 586, 624 *passim* (ABA) (J. Fedders, J. Harris, R. Olsen, B. Ristau ed. 1984) (brackets added) (collecting cases). American legal commentators question whether the analysis of the act of state doctrine in such cases can be reconciled with the traditional application of act of state in other areas, *see, e.g. id.*, and suggest that the parameters of the act of state doctrine should at last be clarified by this Court in order to provide guidance for lower courts. *See, e.g.*, Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 Va. J. Int'l L. 685 (1976); Note, *Judicial Balancing of Foreign Policy Considerations,*

Moreover, no exception to the act of state doctrine applied here, whether by virtue of *Sabbatino* or otherwise.[30]

Even if the act of state doctrine "is completely inapplicable in the investigatory or criminal context,"[31] this case is a civil

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Comity and Errors Under the Act of State Doctrine, 35 Stan. L. Rev. 327 (1983). The factors set forth in *Sabbatino* all counsel application of the doctrine and judicial abstention in this case. In the alternative, there was no subject matter jurisdiction in fact to issue or enforce the subpoena with respect to the Cayman Brady documents. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936); *see Menchaca v. Chrysler Corp.*, 613 F.2d 507, 511 (5th Cir.) (burden of proof on plaintiff to establish jurisdiction in fact), *cert. denied*, 449 U.S. 1093 (1980).

[30] *Contra*, the decision below, 740 F.2d at 832 n.23:

> Even if we were to assume that the act of state doctrine applied, this case would fall within the [Second Circuit's] *Sabbatino* exception. . . . "[W]hen the executive branch of our [United States] government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen . . ."

(Quoting and following District Court's quotation from *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964)) (brackets added).

This Court reversed the Second Circuit's decision in *Sabbatino* 20 years ago. Moreover, this Court has, in amici's view, repeatedly declined to recognize such an exception on separation of powers grounds, specifically on the basis that United States courts do not and should not need the permission of the executive branch to determine their jurisdiction *vel non* in a given case. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J., concurring); *accord id.* (Powell, J., concurring); *id.* at 788-89, 792 (Brennan, J., joined by Stewart, Marshall, & Blackmun, J.J., dissenting).

[31] 740 F.2d at 831. These amici agree that Brady, wherever he may be found, cannot maintain that the United States lacks extraterritorial jurisdiction to prosecute him under the Single Convention. *See* Single Convention, art. 36(2)(a)(iv), *quoted and explained in, e.g., Chua Han Mow v. United States*, 730 F.2d 1308, 1312-13 (9th Cir. 1984), *pet. for reh'g and suggestion for reh'g en banc filed*, (9th Cir. Apr. 26, 1984). It does not follow from this limited grant of extraterritorial jurisdiction under Article 36 that the United States can ignore its duties to the United Kingdom and Cayman under Article 35(e) to use diplomatic channels for the purposes of obtaining the Cayman Brady documents for such prosecution. Neither does it follow from this limited grant that the act of state doctrine embodied in the Single Convention "is completely inapplicable in the investigative or criminal context."

contempt case, *not* a criminal case—a fundamental distinction under the controlling decisions of both this Court *and* the

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On the contrary, the U.S. [Turks and Caicos] Memorandum, note 25 *supra*, involved the United States' recognition of a Turks and Caicos court's judgment of *criminal* forfeiture. *See Regina v. Human & Burt*, No. 138/81 Crim. Div. (Magistrate's Ct., Turks and Caicos Islands 1981) (order of forfeiture of aircraft used for transportation of cannabis entered upon conviction of defendant). It is the United States' recognition of the applicability of the act of state doctrine to that judgment which forms the basis of the United States' legal justification for its conduct and Single Convention defense in the pending *Milburn* case, note 25 *supra*: "[T]he [United States'] action [in returning to the Turks and Caicos the aircraft forfeited in *Human & Burt*] was a valid exercise of police powers in order to prevent a violation of a foreign nation's laws and to honor a foreign court judgment." Brief for [Defendant-Appellee] United States at 15, *Milburn v. United States*, 734 F.2d 762 (11th Cir. 1984) (filed by U.S. Atty., S.D. Fla.) (brackets added) (case citations omitted). "Indeed the government officers were required to release the aircraft to the foreign government since the obligations under the treaty are mandatory." *Id.* at 9 n.9.

> The Turks and Caicos Islands is an adopting party to the [Single Convention] treaty, and the officials of the United States had a duty to cooperate with that government under the treaty. . . . It would be unreasonable to expect other nations to cooperate with the United States if the United States is unwilling to live up to its own treaty obligations. . . . The treaty involved here is self-executing. . . . Even if the treaty was not self-executing, there are very important policy considerations weighing in favor of our cooperation. One such consideration is the treaty itself. Article 14 of the treaty provides for sanctions which may be imposed against any party which fails to perform its duties under the treaty. . . . Furthermore, under the provisions of the treaty, the government officials were obligated to honor the claim of the foreign country. . . .

Id. at 11-12, 14 & nn.13 & 16 (footnotes and citations omitted) (brackets added).

For an earlier and extended treatment of the United States' obligations to the United Kingdom and its dependent territories under the Single Convention (making the above points and anticipating the U.S. [Turks and Caicos] Memorandum), see [United States'] Memorandum of Law in Support of Motion to Dismiss, or in the Alternative, Motion for Summary Judgment at 3, 5-6, 8-9 & n.12 (Dec. 30, 1982), in *Milburn v. United States*, No. 82-6514-CIV-Gonzalez (S.D. Fla. filed Aug. 4, 1982), *motion granted and complaint dismissed with prejudice*, (S.D. Fla. Mar. 22, 1983), *vacated and remanded*, 734 F.2d 762 (11th Cir. 1984) (holding dismissal order was summary judgment without notice) ("expressing no opinion on the merits").

Eleventh Circuit. Moreover, in this case the United States, not the Bank, held the keys to the Bank's prison—a prison not of the Bank's own making.[32] Had the United States used the less intrusive diplomatic channels available, no "prison" would have existed; the Cayman authorities would have permitted the

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The above clearly contradicts any conclusion that the United States "cases clearly establish that a country's obligations to cooperate under the Single Convention are governed by its own domestic law." 740 F.2d at 831. In fact, as *Milburn* and many other United States cases demonstrate, the United States has repeatedly argued the opposite in United States courts, *including* the courts below. *See* note 25 *supra*. Similarly, United States courts uniformly conclude that *foreign governments'* obligations to cooperate *with the United States* under the Single Convention are governed *by* the Single Convention—not those foreign governments' domestic law. *See, e.g., Chua Han Mow, supra*, 730 F.2d at 1313 ("The only effect of the provision [Single Convention, art. 36(2)(a)(iv)] is that Malaysia would have been required to prosecute Chua [a Malaysian citizen] if extradition had not been acceptable to Malaysia. The provision is not applicable in this case because extradition was acceptable to Malaysia.") (brackets added). *See also Nigro, supra*. Ironically, the *only* domestic law requirement expressly protected in Articles 35 and 36 is the absolute right of a signatory to insist that fellow signatories use diplomatic channels to obtain information. Single Convention, art. 35(e).

[32] Paradoxically, a more traditional view of civil contempt was taken by the Eleventh Circuit less than a month later:

> [C]ivil contempt [is] a sanction designed to compel a person to do what the court has ordered him to do. Since contempt is a conditional sanction, the person in civil contempt must be given the opportunity to bring himself into compliance. *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965). Thus, inability to comply is a complete defense to a contempt citation. *United States v. Rylander*, 460 U.S. 752, ____, 103 S. Ct. 1548, 1552, 75 L. Ed. 2d 521, 528 (1983); *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984). A person in civil contempt holds "the keys to his prison." *See generally*, 3 C. Wright, Federal Practice and Procedure § 704 (2d ed. 1982). It is true that the Court in *Newman v. Alabama* noted that good faith would not preclude a contempt citation. 683 F.2d at 1318 n.16. But a person who attempts with reasonable diligence to comply with a court order should not be held in contempt. *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir. 1981).

Newman v. Graddick, 740 F.2d 1513, 1524-25 (11th Cir. Sept. 10, 1984) (brackets added), *petition for reh'g filed*, (11th Cir. Oct. 1, 1984).

Bank to produce the Cayman Brady documents to the United States in a timely and orderly manner.

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CERTIFICATE OF SERVICE

I, Cloyce L. Mangas, Jr., a member of the Bar of this Court, certify that three copies of the foregoing Brief of the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands as Amici Curiae were served this 13th day of October, 1984, by mail, postage prepaid, upon the following counsel:

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